United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7627

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DOCKET 75-7627

COMPANIA PELINEON DE NAVEGACION, S.A.

Plaintiff-Appellant,

—against—

TEXAS PETROLEUM COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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Appellee's "Statement of Case"

It is contended by appellee that appellant's claim is "wholly speculative" with respect to the method of rating referred to as World Scale, erroneously described as "an index to describe the level of the charter market". See Point II, infra.

Contrary to appellee's assertions, the District Court's only reasons for denying 4 days of the claim for charter hire during the repair period were:

> "In the circumstances that (1) plaintiff long and unreasonably delayed in drydocking its vessel and (2) the unconvincing evidence purporting to show that both types of repairs were made in the time required to make the unseaworthy repairs, the Court finds and holds that four days of the total repair time should be deducted in computing plaintiff's loss of profits during the drydock period at Hoboken." (243a)*

Whatever other factors entered into the Court's determination of this issue are not stated, as appellee asserts (p. 3**).

Appellee's "Statement of Facts"

The District Court did not find that "Texpet . . . knew nothing of the terms of the agreement" referring to the charter between appellant and the Charterer (p. 5). The charter party involved here was a Texaco Tanker Time Charter Party (parent of appellee) and the off-hire clause which precipitated the extension of the charter was a printed clause contained therein (165a; 198a). While the Court did state "it has not been shown" that appellee knew what kind of charter party the vessel was operating under, this cannot be construed as an affirmative finding that appellee was unaware of the terms of a standard tanker time charter form which Texaco prepared, and which contained a printed clause similar to that in standard tanker charter parties. See, e.g., Defendant's Exhibit K, clauses 1 and 11.

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* References to Joint Appendix.

** References to Appellee's brief.

The District Court did not find that "When a vessel is operating under a time charter, problems often arise as to when the vessel is to cease operating under a time charter", nor that the "underlap/overlap" rule applied to this case (p. 7).

Appellee relies primarily on "Finding of Fact 35", adopted verbatim by the District Court from Defendant's Proposed Finding of Facts and Conclusions of Law, and which contains ultimate conclusions and conclusions of law which are not binding on this Court under the "clearly erroneous" doctrine.

Appellee infers a failure of proof when it says "There was no evidence of any offers to charter the CAPETAN MATHIOS during the extension period (p. 8)." Obviously there could be no offers because the vessel could not operate on the open market during this period. As a direct result of the Tumaco casualty, it was bound to operate under the existing charter with Gulf and thereby suffered loss of profits it could have made on the open market.

In its misapplication of the underlap/overlap concept (pp. 9-10), appellee disregards the rule of law which would have made Gulf liable for the freight at the market rate during the time after the date on which the vessel was to have been redelivered. The District Court did not find that an underlap/overlap rule was applicable nor did it find that "Under any view, the charterer should have been permitted to take another voyage after October 25, 1973 with a November 1 or November 5 expiration date." This whole area of speculation and assumption and surmise is totally out of place in a purported "Statement of Facts" and is predicated on hypothetical questions without basis in fact

put to Mr. Hatgis, the principal witness for the appellant (pp. 8-10). No such findings of fact were made on those hypothetical questions and answers.

The difficulty of measuring precisely the amount of damages suffered does not relieve a party responsible for those damages from his liability.

The World Scale system, as described by appellee (p. 15), is much more than a mere "index". It takes into account almost all of the variables which appellee has deemed speculative in determining rates between ports for the transportation of a ton of cargo so that "Between any two ports. The end result will be the same. The freight collected will be different. The profit to the owner should be the same" (75a). "The times, and everything is taken into consideration by World Scale in order to fix the rates" (82a).

There is no basis for appellee's argument that other vessels operated by Fafalios must be included in the Court's considerations. Each corporation is a separate legal entity, which is undisputed.

The whole thrust of the appellee's argument is that the appellant cannot prove its claim for lost profits in the extension period with reasonable certainty.

It is clear that if any uncertainty exists in the computation of the damages sustained during the extended period of the charter, it is due solely to the consequence of the casualty which tied up the vessel with the charterer.

I.

Appellee's Point I

The District Court erred in ruling that the loss of profit sustained in the extension period was "too unforeseeable, remote and speculative to properly be considered as consequential damages recoverable in this tort action." (260a). On the contrary, the loss of profits sustained by a shipowner is a readily foreseeable and expected result of a casualty which requires repairs to the vessel. See, e.g. *The CONQUEROR,* 166 U.S. 110, 125 (1897); *The POTOMAC,* 105 U.S. 630, 631-632 (1881); *Ove Skou* v. *United States,* (5 Cir., 1973), 478 F.2d 343 and cases cited therein. A ship which is being repaired is obviously not going to be earning anything for her owner during the period of repair. It is also readily foreseeable that the detention may cause the vessel to miss a charter or charters which she could have undertaken at a profitable rate. This is an item which the courts recognize as a compensable item of damage. *The GYLFE* v. *The TRUJILLO,* (2 Cir., 1954), 209 F.2d 386; *Ove Skou* v. *United States,* (5 Cir., 1973), 478 F. 2d 343 (and cases cited therein).

Here, the vessel lost time at Tumaco while undergoing a preliminary investigation of the damage, and time at Hoboken while the damage was being repaired. The off-hire time was added to the period of the charter, extending it by about 25 days. (Stipulation in P.T.O. p. 3; 254a-255a). As pointed out in Appellant's Brief (p. 12), it was not unforeseeable that the vessel would be operating under a charter which required the owner to extend the term of the charter by the amount of off-hire sustained by the vessel.

Any "uncertainty" existing at the time of the casualty related not to the *fact* of damage to the shipowner, but rather to the *extent* of those damages.

Appellee relies heavily upon the English case of *The SOYA*, [1956] 1 Lloyd's Law Reports 557 (Courts of Appeals), concerned with a voyage charter and an incorrect statement of the law in this country where the courts follow the "three voyage rule" when voyage charters are involved. See *Moore-McCormack Lines, Inc.* v. *The ESSO CAMDEN*, (2 Cir., 1957), 244 F.2d 198, cert. denied, 355 U.S. 822 (1957); *The BULGARIA*, (N.D.N.Y., 1897), 83 Fed. 312; *The TREMONT*, (9 Cir., 1908), 161 Fed. 1; *The NYLAND*, (D. Md., 1958), 164 F. Supp. 741; But see, *The GYLFE* v. *The TRUJILLO*, (2 Cir., 1954), 209 F.2d 386. The general maritime law of the United States is set forth in the recent decision of *Ove Skou* v. *United States*, (5 Cir., 1976), 526 F.2d 293, where the court recognized that

> "The whole thrust of the plaintiff's case is that because of the delay while the ship was under repairs it was off the market for future charterers and the time at which it could *commence* its next charter was delayed by that same number of days." (526 F.2d at 296; emphasis in original).
>
> * * * * *
>
> "The trial court seemed impressed with the fact that MADS SKOU was not prevented from carrying out the charter party it desired. The court entirely overlooked, however, the fact that in doing so it was unable to perform by delivering the vessel to the charterer until nine days later than would have been the case but for the accident." (526 F.2d at 297).

The CAPETAN MATHIOS was "off the market for future charterers" during the extension of the charter attributed to the Tumaco casualty, and the time at which the CAPETAN MATHIOS could commence its next charter was delayed by the number of days attributed to the Tumaco casualty.

In *Ove Skou v. United States, supra,* 526 F.2d 293, the Court allowed recovery for the delay in commencing the next charter because:

> ". . . nine days, at least, out of the current year's income from MADS SKOU has been lost because her owner was unable to deliver the vessel to its next charter until nine days later than would otherwise have occurred." (526 F.2d at 298).

Similarly, the appellant has lost the profit it could have made on the CAPETAN MATHIOS in the 25 day delay in being released from the Gulf charter and in trading on the charter market. The only uncertainty existing at the time of the casualty related not to the fact of damage, but rather to the extent of damage. The authorities cited in Appellant's Brief (pp. 12-13) demonstrate that this uncertainty is not a bar to recovery for these "uncertain" damages. Just as a tort feasor is liable for the extent of physical damage he has caused, which may not be immediately apparent at the time of the incident, so also is he liable for the extent of lost profits he has caused which may not be immediately apparent at the time of the incident.

The loss of profit sustained by appellant during this extension period cannot be said to be "only a fortuity" nor

can the link between the casualty at Tumaco and the 25 day extension of the charter attributable to that casualty be "too tenuous" so as to relieve appellee from liability for the loss. See, *Petition of Kinsman Transit Company*, (2 Cir., 1968), 388 F.2d 821. "But for" the casualty at Tumaco, appellant would have commenced operations in the charter market at least 25 days sooner than it did. The loss of profit sustained in that period in which it was deprived of the use of the vessel is a direct, foreseeable result of the casualty. The harm to be feared, the "force that gave rise to the requirement that the defendants were to exercise care" (p. 23) was loss of profit from delay and loss of use of the vessel for the owner's account. This is precisely the harm which occurred, a harm within the scope of the foreseeable risk.

The rulings of the District Court at pages 260a-261a, numbered 35, constitute a mixture of ultimate conclusions and conclusions of law. They are based upon the erroneous view of the law that uncertainty as to the extent of damages relieves a party liable for the fact of damages. See authorities cited Appellant's Brief (pp. 12-13).

As such, these rulings are not binding on this Court under the "clearly erroneous" rule. This is succinctly summed up in *Ove Skou* v. *United States*, supra, 526 F.2d 293:

> "As stated by this Court in *Galena Oaks Corp.* v. *Scofield*, 218 F.2d 217 (5th Cir. 1954), and cited many times since:
>
> "Insofar, however, as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal

> significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so-called "clearly erroneous" rule.' " 218 F.2d at p. 219, citing *Lehmann* v. *Acheson*, 3rd Cir., 206 F.2d 592, 594." (526 F.2d at 295.)

See also, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394, 396 (1948); 5A Moore's Federal Practice, 2d ed., ¶ 52.03[3], p. 2664.

Even if the "clearly erroneous" doctrine were applicable, the Court may reverse where, as here, "[T]he reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, *supra*, 333 U.S. at 395.

The District Court erred in ruling that appellee was not liable for the loss of profits sustained. *Ove Skou* v. *United States*, *supra*, 526 F.2d 293.

II.

Appellee's Point II

The District Court denied any recovery to the appellant shipowner for lost profit during the period of the extension of the charter. Appellee has asserted without factual support that the CAPETAN MATHIOS was one of a fleet of vessels and that no loss of profits was sustained because other vessels in the alleged group could have been used to mitigate the loss sustained. In speculative and conclusory terms, it argues that an asserted "Falfalios Group must have been operated as a fleet" (p. 17), on the basis of two exhibits (Defendant's Exhibits Bc and Bd) which on their face show different corporate ownership of the vessels in

the alleged group. Nowhere does the record show any support for the allegation made in appellee's Statement of Facts that:

> ". . . decisions, as to how individual vessels were chartered, were not made and could not have been made without considering what the other vessels in the fleet were doing or how they were fixed into charters." (p. 17)

The same argument regarding fleet operations was knocked down by the Court in *Ove Skou* v. *United States*, supra, 526 F.2d 293 which stated:

> "Faced with a situation that these three ships would be available within the overall period, June 20 and July 5, and without any evidence in the record to indicate the actual availability of the vessels other than MADS SKOU, except that at some time prior to the cancellation dates of June 29 and July 5 respectively for MARIE and INGER they could have been replaced by MADS, we conclude that there was no basis for the trial court's denying the owner a right of recovery for the delay on the ground that the management decided to commit MADS SKOU to perform its own charter party instead of the other ships 'because of her recent dry docking.'" (526 F.2d at 297).

The CAPETAN MATHIOS was owned by appellant, and Defendant's Exhibits Be and Bd show the separate corporate ownership of the other vessels mentioned. As stated in *Sabine Transp. Co.* v. *S.S. ESSO UTICA* (E.D. Tex., 1955), 1955 A.M.C 2102:

"[I]t is well-established corporation law that in order to disregard separate legal entities of corporations, even where there is majority stock ownership by one corporation of the capital stock of another and where there are interlocking directorships, the relation between the two corporations must be used to defeat public convenience, justify wrong, protect fraud, or defend crime." (1955 A.M.C. at 2107.)

Appellee also argues that such "uncertain" elements as the ports which the vessel will move between, the amount of time the voyage will take, and the amount of expenses it will incur, all prevented the appellant from demonstrating its loss with "reasonable certainty". Appellee's arguments, adopted wholesale by the District Court in Finding Number 35 (260a-261a), ignore the reality and operation of the World Scale System, used by brokers and shipowners in the chartering of vessels. This system was described in the testimony (21a-22a; 74a-75a; 81a-84a) as taking into consideration, in establishing the base freight rates, many of the variables and alleged "uncertainties" in the charter market which the appellee asserts as demonstrating the alleged "speculative" nature of the lost profits sustained by the appellant. The World Scale System, which appellee pointed out in cross examination "is the rate you live by in the charter market business" (81a), takes into account the distance between different ports, the average time of the voyage, the expenses encountered at the various ports, etc. so that "the end result will be the same. The freight collected will be different. The profit to the owner should be the same." (75a).

Appellee also asserts that it was uncertain when the vessel would have been returned to the appellant had the

Tumaco casualty not occurred. This is in direct contradiction to the stipulation entered into by the appellee in the Pre-Trial Order on Consent:

> "The CAPETAN MATHIOS would have completed its time charter party commitment and all extensions, except that related to the Tumaco casualty by on or about October 30, 1973. The vessel came off charter after all extensions on November 24, 1973." (P.T.O. 3)

and

> "The time during which the vessel was having hull repairs made as a result of this casualty and the time the vessel was delayed at Tumaco as a result of the casualty amounted to 25.179 days came within the off-hire provision and the charterer exercised its option to extend the charter for the off-hire period of about 25 days." (P.T.O. 3).

At the trial, in order to pursue its hypothecation, appellee argued that "by on or about October 30, 1973" meant anytime up to and including November 8, 1973 (65a-66a). It is patently absurd that in a business which calculates the allowed time for use of a vessel down to hours and minutes and tenths of minutes, a statement of return "by on or about" a given date would mean an allowance of up to 9 days later. Appellee bases this argument that such a late return date of November 8, 1973 is possible on the assertion that the underlap/overlap rule regarding return of vessels under charter applies to this case.

In the first instance, it must be pointed out that this rule does not apply to the Gulf charter. If there is insufficient

time left under the charter to complete a voyage, the charterer cannot make that voyage (156a-160a; 223a-230a).

Contrary to appellee's argument (p. 31), the law fully supports appellant's position. The charter to Gulf is one for a fixed term of "two years, one month more or less" (193a). The word "about" has been stricken from the charter (197a, Cl. 3 of the Texaco Tanker Time Charter Party Form). The authorities cited by appellee all deal with charters of an indefinite term, those with "about" qualifying the stated term. The law as to fixed term charters is stated in *The RYGJA* (2 Cir., 1908), 161 Fed. 106. The Court states:

> "Charters for a fixed period involve from the nature of things considerable difficulties because of the uncertainty as to the time voyages are likely to occupy. At the expiration of a *fixed term* the charterer is no longer entitled to possession. If in the employment of the ship he overruns the term, he is certainly liable at the charter rate of freight for the overlap, and, if freights have risen, to the difference between the market rate and the charter rate in addition. If the last voyage of the vessel terminate so near the expiration of the fixed term that another voyage cannot be made, the charterer either loses that time entirely, or if he employs the vessel on another voyage, he does so at the risk of being liable for the increase of the market rate of freight for the overlap." (161 Fed. at 107) (emphasis added).

The underlap/overlap rule does not apply in this country to charters of a *fixed* term. See *Prebensens Dampskibsselskabet A/S* v. *Manson S.S. Line* (2 Cir., 1919), 258 Fed.

227; *Trechmann S.S. Co.* v. *Munson S.S. Line*, (2 Cir., 1913), 203 Fed. 692; *The NEGUS* (S.D.N.Y., 1923), 298 Fed. 749, aff'd (2 Cir., 1924), 298 Fed. 752; *Britain S.S. Co.* v. *Munson S.S. Line* (2 Cir., 1929), 31 F.2d 530, cert. den. 280 U.S. 574 (1929).

The one case cited by appellee which does deal with a charter for a fixed term is *Straits of Dover S.S. Co.* v. *Munson*, (S.D.N.Y., 1899), 95 Fed. 690. That case is clearly distinguished by the fact that the vessel involved was on a single voyage from New York to Mexico and return. The vessel was in Mexico when the charter term expired and the court ruled it could return to New York with a cargo rather than immediately return under ballast, and would be liable only at the charter rate of hire, as the parties had contemplated a round trip voyage in the charter agreement.

The speculative argument made by appellee at pages 34 through 36 of its brief has no support in the record. The appellee uses figures based upon the charters entered into by the CAPETAN MATHIOS *after* the conclusion of the time charter, at a time when the market rates were lower than those applicable during the extension period of the charter, and at a time when bunker prices were much higher. Referring to foot note (p. 33), Mr. Hatgis' testimony properly stated was that bunkers were very high at the "*latter* part of November" rather than as inferred by appellee. (emphasis added).

As stated by this Court in *Moore-McCormack Lines, Inc.* v. *The ESSO CAMDEN*, (2 Cir., 1957), 244 F.2d 198, cert. denied, 355 U.S. 822 (1957),

> "The measure of a ship's demurrage is the amount the vessel would have earned in the business in which she has been customarily employed." 244 F.2d at 201.

The CAPETAN MATHIOS was "customarily employed" in the Caribbean-East Coast United States trade. The World Scale rates, and the availability of charters for this trade are demonstrated in the Record (Plaintiff's Exhibit 12, p. 5; Plaintiff's Exhibit 13; Testimony at 28a-29a; Appellant's Brief, pp. 14-15). These market rates are consistent with the average World Scale 375 used in computing appellant's damage claim for lost profit during this period. Plaintiff's Exhibit 35 (214a) shows the profit which appellant could have made on the last two voyages undertaken in the charter extension period at the then prevailing World Scale rates. The figure obtained thereby of $390,516.00 compares favorably with the estimated figure of $400,374.31. During this period the vessel actually was paid $97,077.26 thus showing the loss sustained by appellant.

The District Court erred in ruling that appellant has not shown its loss with "reasonable certainty". As stated in *Ove Skou* v. *United States*, (5 Cir., 1973), 478 F.2d 343:

> "The requirement that a shipowner offer proof of loss is not equivalent that he prove the loss of a specific charter at a definite time and place." 478 F.2d at 346 (and cases cited therein).

III.

Appellee's Point III

Appellee argues (page 44) that the purpose of appellant in going into the repair yard in Hoboken was to undertake and perform owner's work and surveys not due for another year. The record shows that the purpose of the repair period was to effect the Tumaco damage repair. (Plaintiff's Exhs. 17, 18, 19, 20 and 20A at 188a-192a; Hatgis 59a). The law is clear that a shipowner may take advantage of the time when repairing damage to his vessel caused by a casualty to perform owner's work. See authorities cited in Appellant's Brief, (pp. 18-20).

Appellee's major argument is premised on the assertion that it is the knowledge of the shipowner regarding an unseaworthy condition and his intention in going into the shipyard which is controlling on the question of whether or how much he can recover for the lost profits during the repair period. This is simply not the law. The cases cited by appellee in support of this assertion (p. 39) deal with situations where the vessels were not in fact unseaworthy at the time of the decision to undertake the repairs made necessary by the collision, and where it was unreasonable for the owners to put them in drydock at that time.

The law as to seaworthiness is that a shipowner is responsible for the seaworthiness of his vessel, and is liable for damage caused by an unseaworthy condition whether he knows about the unseaworthy condition or not. The District Court correctly concluded:

"37(a). Plaintiff was under a nondelegable duty to exercise due diligence to make his vessel seaworthy. (citations omitted.)

37(b). When a vessel has a certificate of seaworthiness from the American Bureau of Shipping or other authorized agency that of itself does not establish that the vessel is seaworthy. (citations omitted.)

37(c). The plaintiff was under a duty to investigate the extent of the damage sustained in the Tumaco casualty, and exercise due diligence to ensure the seaworthiness of the vessel until it drydocked CAPETAN MATHIOS in March/April, 1973. (citations omitted.) (262a-263a).

The District Court also found, in its Oral Decision that "at some time prior to the drydocking referred to, the Tumaco casualty caused the CAPETAN MATHIOS to become unfit for sea voyage and therefore, in fact, unseaworthy" (243a).

The vessel was unseaworthy, the appellant had a duty to discover and correct the situation and did so at a time when the vessel and the fair water cone were together in a position to perform the repairs. Appellant was performing repairs made necessary by the Tumaco casualty which rendered the vessel unseaworthy. As a result, an anticipated 4-7 day repair period for the Tumaco repairs became approximately a 23 day repair period.

The fact that the appellant took the risk of delaying the repair period until March/April 1973 does not relieve the appellee of the obligation to compensate the appellant

for time lost during the repair period. The District Court properly found, that:

> "Had the vessel continued to operate in its damaged condition, it was possible there could have been a complete slippage of the shaft and a disaster could have occurred, as a result of overspeeding of the turbine . . . All the damage discovered resulted from the casualty which occurred at Tumaco on September 29, 1972 . . ." (253a)

This Court is faced with two irreconcilable findings of the District Court. First, the District Court found:

> "In the circumstances that (1) plaintiff long and unreasonably delayed in drydocking its vessel and (2) the unconvincing evidence purporting to show that both types of repair were made in the time required to make the unseaworthy repairs, the Court finds and holds that four days of the total repair time should be deducted in computing plaintiff's loss of profits during the drydock period at Hoboken." (Court's Oral Decision, 243a.)

and then

> "There has been no showing that plaintiff's repairs effected at Hoboken extended the detention period beyond the time necessary to repair the Tumaco damage." (Court's Oral Decision, 244a.)

The "long" delay did not in any way prejudice the appellee because the measure of damages for this period of repair is the charter hire. Indeed, the delay mitigated damages in that had the vessel gone to drydock immedi-

ately to repair the propeller and inspect for internal damage, which would then have been discovered and repaired, the vessel would have had to return to drydock later to replace the fair water cone which was not available until January 1973, with all the attendant costs being for appellee's account.

As shown at the trial, the owner's work consisted of repairs to a boom, cleaning sea chest strainers and steam turbine casing work, which amounted to a cost of $3,535 (205a-206a; Appellant's Brief, p. 18). The vessel's bottom was routinely painted at this time as well, and certain classification surveys were also performed. As to all of this, appellee's surveyor, Henry Halboth, stated in his report:

> "While the vessel was on dock, owners took the opportunity of effecting biennial classification survey, together with attendant obligations, and cleaned and painted the underwater hull. *Owners work was carried out concurrently* with survey repairs, and, if done alone, would have required two (2) days on drydock." (182a) (emphasis added).

The report also indicates that the drydocking time for the repairs resulting from the Tumaco casualty was two haul days and two lay days (182a).

A survey report by the Salvage Association of London, on behalf of the vessel's hull underwriters, states:

> "For the purposes of adjustment it is estimated that if repairs as a consequence of the above casualty had been effected alone, they would have taken the full period, i.e. 2 Haul Days, 2 Lay Days and 17 days afloat." (183a).

The inescapable conclusion is that the repairs necessitated by the Tumaco casualty and owner's work were performed at the same time and that owner's work did not extend the repair period.

Therefore, it is respectfully submitted that the District Court erred in disallowing four days of lost profit during the repair period from appellant's recovery.

IV.

Appellee's Point IV

Appellee contends that the appellant injected "unmeritorious issues into the case" and because the "judgment recovered was insignificant in comparison to the amount sought" and that the District Court did not err in denying appellant its costs (pp. 47-48).

The issues in this case can hardly be termed "unmeritorious" merely because the District Court denied recovery for the period of the extension of the charter. The issue is one of the most basic principles of compensatory damages—*restitutio in integrum*, making the appellant whole by placing him in the same position he would have been in had the Tumaco casualty never occurred, or as near thereto as possible. The claim for lost profits from failure to obtain future charters due to a detention necessitated by collision repairs is a valid and recognized claim. See *Ove Skou* v. *United States, supra*, 526 F.2d 293.

The assertion that the amount recovered in comparison to the amount sought should control the disposition of costs is an obscured view of the law. The authorities cited in

Appellant's Brief, pp. 22-23 demonstrate that there must be some fault on the part of the prevailing party before he may be penalized by the denial of costs. Here, there was no fault on the part of appellant, but rather fault on the part of appellee. There was no offer of judgment of any part of the appellant's detention claims. Hence, appellant was forced to litigate its claim.

A major item of the costs sought to be recovered was necessitated by appellee's refusal to admit, as requested pursuant to Federal Rules of Civil Procedure, Rule 36, that the vessel was *in fact* unseaworthy (7a-8a; 9a-11a). Because of this refusal to admit, appellant had to call an expert witness, whose testimony was accepted by the Court in ruling that the Tumaco casualty caused the vessel to become *in fact* unseaworthy and that all of the damage discovered during the repair period was due to the Tumaco casualty. (243a; 253a).

The District Court erred in denying appellant its costs.

CONCLUSION

For all of the above reasons, and those cited in Appellant's Brief, the District Court's decision should be modified to allow appellant full recovery for lost profits during the repair period, to allow appellant recovery of lost profits during the extension of the charter attributed to the Tumaco casualty, with interest on both, and to allow appellant recovery of its costs.

Respectfully submitted,

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BURLINGHAM UNDERWOOD & LORD
Of Counsel

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 10th day of March 1976 , at 4 o'clock P. M. he served the annexed Appellant's Reply Brief, in Re: Compania Pelineon de Navegacion, S.A. v. Texas Petroleum Co. No. 75-7627

upon Bigham, Englar , Jones & Houston

Esq(s)., Attorney(s)

for Defendant-Appellee

by depositing 3 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

99 John St. New York, N.Y.

that being the address designated in the last papers served herein by the said attorney.

Sworn to before me this 10th day of March 1976

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602733
Qualified in New York County
Commission Expires March 30, 1976